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In the Supreme Court of the United States

October Term, 1968

No. 660

In the Matter of

JOHN ELWOOD DENNETT

Petitioner

PETITIONER'S REPLY TO THE JOINT RESPONSE OF BENEFICIAL LIFE INSURANCE COMPANY, ET AL

John E. Dennett, petitioner
appearing pro se
1243 East 2100 South
Salt Lake City, Utah

John Allen
J. Thomas Greene
Milan B. Robbins
Conway Ashton
Roger I. McDonough
Fred L. Finlinson
Fred G. Biesinger
Dudley M. Amoss
Salt Lake City, Utah

Michael F. Morrissey,
Denver, Colorado
Attorneys for Respondants

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Beneficial Life Insurance Company, Beehive State Bank, Walker Bank & Trust Company, Prudential Federal Saving and Loan Association, Fred G. Biesinger and A. P. Neilson have filed a joint response to petitoner's petition. Their response was due about December 1st, 1968. It was filed May 21st, 1969. It is not known whether this court is inclined to consider a response which is filed nearly six months late. If it is so inclined, this, the petitioner's reply may clarify some of the statements

and arguments in that response which are so phrased that they can easily create some wrong impressions. Petitioner has been orally notified that his unsecured creditors disagree with the response of Beneficial Life and others who joined with them and will therefore file a separate response. To distinguish the group which has already responded from those who may yet respond, petitioner will refer to those who have already responded, on or about May 21st, 1969 as "Beneficial, et al."

SUMMARY OF THE ARGUMENT OF BENEFICIAL et al.

Beneficial et al. either admit in the record, or in their response, either expressly or tacitly:

1. That they amongst their group do not have unsecured claims of $500.00 or more.

2. That A. P. Neilson is not a creditor of petitioner.

3. That petitioner has committed no act of bankruptcy.

4. That A. P. Neilson's "motion" is the only pleading in the file which urges the court to adjudge petitioner a bankrupt.

5. That A. P. Neilson's motion is not verified.

6. That A. P. Neilson only, and not three persons, executed the motion.

7. That the motion does not accuse the petitioner of an act of bankruptcy.

8. That the motion was not served by subpoena upon petitioner.

9. That the petitioner was not required by any subpoena or any other document to plead to the motion.

10. That even if the petitioner had been required to plead to the motion, there is nothing in it to plead to. In other words, it does not state a cause of action.

11. That there was no evidence taken at any time during these proceedings; that there was never a trial to determine the issues.

12. That there was never any evidence adduced on the petitioner's status as a wage-earner.

13. That they are speaking only for the six in their group in expressing what is in the "best interest of creditors;" that they are not authorized to speak for the creditors generally.

14. That there are, in fact, other creditors, and that the other creditors might have a different view of what would be in their best interest.

15. That involuntary bankruptcy is used here as a type of punishment.

16. That as a punishment, it is indeed unusual.

17. That no briefs were filed by either side while the matter was on appeal in the Tenth Circuit.

18. That there was no argument on appeal, either in writing or orally.

19. That Beneficial et al, who opposed the appeal at the Tenth Circuit Court level did not serve their motions on any of petitioner's creditors.

20. That petitioner's other creditors were not heard on appeal.

21. That the Tenth Circiut Court did not give any reason, in its order of affirmation, for the action which it took.

In spite of the foregoing admissions, which do not seem to be disputed by Beneficial, et al, they jointly argued to and urge upon the Supreme Court the following propositions, which seems to fairly summarize the argument in their briefs.

1. They have some status as "creditors." This status is derived from USC 806. 11 USC 806 broadens the definition of a creditor for purposes of Chapter XII proceeding only.

2. It doesn't matter that they do not have amongst their group $500 or more in unsecured claims. They say that in forcing a conversion of a Chapter XII proceeding into a regular bankruptcy, one needn't have an unsecured claim in any amount.

3. There needn't be a petition.

4. A. P. Neilson's motion is sufficient.

5. A. P. Neilson's motion didn't need to allege that petitioner has committed an act of bankruptcy.

6. A. P. Neilson didn't need to be a creditor.

7. A. P. Neilson needn't be joined in his petition by two other creditors.

8. That A. P. Neilson's motion need not be verified.

9. They say it wasn't necessary that the motion be served by subpoena

10. It isn't necessary that petitioner have opportuni-

ty to answer or otherwise plead to some supposed allegation of bankruptcy.

11. There needn't be a trial held to determine evidentiary matters or matters of fact.

12. There needn't be any evidence taken on the question of whether petitioner committed an act of bankruptcy.

13. That it matters not if the court inflict unusual punishment as long as the punishment inflicted is not a part of a criminal proceeding.

14. That petitioner is precluded from raising wage-earner status as an affirmative defense because he did not raise it on an appeal that never was heard, but which was disposed of in the 10th Circuit Court.

15. Petitioner is precluded from claiming wage-earner status because of statements appearing in the schedules and in the statement of affairs.

16. Beneficial et al knows what is "in the best interest" of all creditors.

17. That no evidence is necessary in order to determine what is in "the best interest of creditors." Their subjective judgment on that question should be sufficient.

18. That the only pivotal and decisive question is whether or not some schedules were filed on time, and if they are late, what Beneficial et al thinks should be meted out by way of punishment therefor.

19. That it matter not *why* the schedules were filed late. Irrespective of the reason, and irrespective of any other facts, late filing of schedules means *ipso facto*

involuntary bankruptcy—for anybody and for everybody.

20. That Judge Christensen didn't depart from the accepted and usual course of judicial procedure by proceeding without any pleadings from either side, or by skipping the trial or by refusing to hear evidence, or by making findings without evidence, or by ignoring due process, or by ignoring constitutional guarantees, or by ignoring rules of civil procedure, statutes, and local custom and practice.

21. That the 10th Circuit didn't, in their own right, depart from the accepted course of judicial procedure, by precluding the filing of briefs, or by precluding oral argument, or by precluding a consideration of the legal, constitutional and factual issues, or by excluding the creditors from participation in the proceedings, or by rendering an "affirmation" without writing an opinion or giving a reason for their action. Moreover they didn't condone any departure from the accepted course of judicial proceedings on the part of Judge Christensen, since, of course, there wasn't any departure.

PETITIONER'S REPLY

Does Beneficial et al have standing as a creditor?

Beneficial et al opts for the proposition that they have standing as creditors of the petitioner. Indeed they have. They correctly demonstrate that 11 USC 806 (Section 406 of the Chandler Act) is broad enough to include them, and to confer upon them the status of "creditor."

Petitioner concedes that point. But this doesn't help them. Chapter XII proceedings are oriented towards the search for an acceptable "arrangement." Since secured creditors would be affected by the "arrangement" they should have something to say about whether an arrangement is acceptable to them. They therefore need some standing to vote on the same when presented. This presumes, of course, that a chapter XII proceeding would have proceeded to the point where an arrangement was the topic of discussion. This one never got that far.

It is Hornbook law that secured creditors are unaffected by regular bankruptcy. Only unsecured creditors are affected.

While Beneficial et al makes a persuasive argument that they, too are creditors, they completely miss the point of bankruptcy. It is *because* regular bankruptcy affects unsecured creditors *only*, that the right to initiate and prosecute involuntary bankruptcy proceedings is severly limited and restricted. A very narrow class of creditors, as defined by section 59 of the Chandler Act (11 USC 95), is allowed to seek an involuntary adjudication. It also takes the concurrance of three creditors who have a minimum of $500.00 in claims in excess of any securities they hold. Now what could be plainer than that?

It is not a questor of whether Beneficial (or the others who join them in their response) is a creditor. That is conceded. It is a question of whether they or any of them belong to the narrow class of creditors which 11 USC 95 allows to initiate and prosecute

involuntary petitions.

Collier, at page 601 in Volume 3 of his treatise has the following to say:

> "(Obviously) a creditor who is fully secured may not join in the petition to have one adjudged involuntarily a bankrupt."
>
> "The petitioning creditors should set forth sufficient facts to show that their claims are within the terms of Section 59 (11 USC 95)"

Who is Beneficial Life Insurance Company?

Beneficial Life Insurance Company is a wholly owned corporate subsidiary of the Mormon Church. Its board of directors consists of the First Presidency of the Church, the Quorum of the Twelve Apostles, and other prominent church authorities. It is run by management which functions quite independently and autonomously from the board of directors. Virgil Smith, the president, in concert with Conway Ashton, Milan B. Robbins, Eugene Watkins, and Max Jenson, lesser functionaries in the corporation, have taken it upon themselves to force petitioner into bankruptcy. They are simultaneously trying to forfeit petitioner's equity in a $60,000.00 home on which they have a $30,000.00 mortgage, through an action in the State Court. (They are not faring too well there).

The board of directors of Beneficial Life Insurance Company, many of whom petitioner knows personally, is absolutely and totally ignorant of what is being done by their company. The minutes of their directors' meet-

ings (which have been examined under discovery rules) disclose no mention of the efforts of Beneficial Life Insurance Company to force petitioner into involuntary bankruptcy. Neither do they disclose any mention of the ostensible efforts of Beneficial Life Insurance Company to forfeit a $30,000.00 equity in a $60,000.00 home.

A more interesting adjunct to the proceedings is a study of the mental processes which impel a secured creditor to be opposed to anything the petitioner is in favor of, and to be in favor of anything petitioner opposes, irrespective of the merits and of the contents of the item.

Paragraph 7 of the arrangement proposed by petitioner, reads as follows:

> "That the $3,100.00 being held in escrow by Stanley Title Company be applied to meet the balloon installment due to Beneficial Life Insurance Company on property owned by the debtor at 2879 Millicent Drive, being purchased under contract from Beneficial Life Insurance Company. Debtor proposes keeping current all payments due on said contract out of current income and without burdening the corpus of the estate for these payments. Debtor is willing, however, as a last resort, to offer said property for sale, in which he has a homestead exemption, in the event it appears that the creditors' claims cannot be otherwise satisfied out of the corpus of the estate or current income, said conditional waiver of exemption is tendered in exchange for leave to use said $3,100.00 to meet the balloon

payment due in two months." (Two months from the date the petition was filed.)

The essence of this plan is to pay Beneficial Life Insurance Company strictly and entirely in accordance with the terms of the security instrument which Beneficial holds.

All of the payments due under the contract to Beneficial Life Insurance Company have in fact been tendered to them even though the arrangement proposed has never been approved. The funds were raised from outside, independent sources.

Now why would a secured creditor oppose a plan which contemplates full performance? Is it because they are so obsessed with opposing petitioner in *whatever* he does that they have lost sight of what it is they are opposing? Are they sadists? Do they reflexively and automatically oppose everything petitioner proposes?

In what way would Beneficial be benefited by an involuntary bankruptcy? In what way will they even be affected? Is it in their best interest that petitioner be adjudicated an involuntary bankrupt? If so, how is it in their "best interest?"

Who is Beehive State Bank?

Beehive State Bank was one of petitioner's clients from 1960 through 1966. A large proportion of all of the legal work that was done for the bank was done by the petitioner. A great deal of the work was in the collection of the bad loan accounts. Frequently, the

bank's debtors would pay the bank directly. In such cases, the bank would owe the petitioner his percentages as fees. These fees, together with other work accrued about $66,000.00. A year ago, Beehive State Bank requested a summary. This summary was provided for them. It showed a net indebtedness of about $66,000.00 owed to petitioner. Since Beehive has not stated which, if any of the items in the summary are inaccurate, it is presumed that they are entirely correct and that Beehive State Bank owes petitioner $66,000.00.

In an independent transaction, petitioner and Beehive State Bank negotiated for the purchase and sale of some third-party obligations, namely the claim of Beehive State Bank against LaVine H. White. Papers which would have accomplished the acquisition were in fact signed. However, after the signing of the papers, Beehive requested and was granted permission by petitioner to abandon that acquisition transaction, and Beehive has since treated the LaVine H. White claim as their own. The papers which were signed recited that the notes which were given by petitioner for the claims were secured by a mortgage on property which was transferred by Beehive State Bank to Herta K. Dennett. That is the basis for the statement in the response brief of Beneficial et al that Beehive's claim is "secured by property belonging to someone other than petitioner." Beehive knows that the nominal title was taken by the third party in trust for petitioner, and that their assertion, that they are *unsecured* because they have no security on the property of the petitioner is downright misleading.

Why does Beehive State Bank want an involuntary bankruptcy and how would they benefit by it? It is very

simple. Whether or not the LaVine H. White obligation is efficacious, Beehive State Bank is petitioner's debtor. If the LaVine H. White transaction is efficacious. Beehive is in petitioner's debt about $36,000.00. If it is not efficacious, Beehive is in petitioner's debt about $66,000.00.

Beehive correctly reasons that it would be easier to induce a trustee to accept a compromise than it would be to induce petitioner to accept a compromise. Their reasoning is good, but they miss the main point. *Involuntary bankruptcy proceedings are for the benefit of petitioner's creditors, not petitioner's debtors.*

Who is Walker Bank?

Walker Bank holds a lien on an office building. The office building has been appraised by Walker Bank's own vice president, who, in a written appraisal, has established the value to be $152,000.00. Walker Bank claims a lien for about $75,000.00 All of the payments which became due on the trust deed have been tendered to Walker Bank.

It is not known why Walker Bank would urge an involuntary bankruptcy against petitioner. It is not known how they would benefit thereby. As a secured creditor, they would be totally unaffected by an involuntary bankruptcy proceeding.

Who is Prudential Federal Savings & Loan

Several Years ago, Prudential Federal Savings and

Loan association made a 1st mortgage loan to Raymond Cecil.

In an independent transaction, Prudential Federal Savings and Loan Association became indebted to the petitioner for various items amounting to several thousand dollars.

Petitioner acquired the title of the Ray Cecil Property by warranty deed subject to the mortgage loan of Raymond Cecil.

Prudential Federal has rented the home to one of its employees and kept the rent. The rental value is in excess of the mortgage payments.

In one sense, Prudential Federal is a creditor of the petitioner because of their mortgage on the Cecil property, but the value of the security is about $20,000.00 and the debt claim of Prudential Federal is about $10,000.00. However, the debt is payable in installments and the security is not in jeapordy.

In a larger sense, however, Prudental isn't a creditor at all. It was not petitioner, but Raymond Cecil who borrowed the money. There is no way that Prudential could recover any deficiency against petitioner.

In a still larger sense, Prudential Federal is petitioner's debtor. Prudential owes petitioner the amounts recited hereinabove. The amount Prudential owes petitioner may be less than the balance owing on the mortgage, but that can only be ascertained when Prudential furnishes petitioner with an accounting. It is not clear how Prudential would benefit from an involuntary bank-

ruptcy since they are not a creditor and would not be affected by an involuntary bankruptcy proceeding.

Who is Fred Biesinger:

In 1962, Fred Biesinger acquired, by endorsement, a note of a third party, B. Spencer Young, Jr. He wanted the note collected when due, but was on his way to Europe. He also needed some cash. He didn't want to sue for recovery of the note if it was not paid when due, because he didn't want to come home from Europe to try the case. Fred Biesinger endorsed the note to petitioner guaranteeing the payment thereof, in exchange for petitioner's note. Petitioner has paid to Fred G. Biesinger, all of the money which he had coming on the note, after off-setting some of the counterclaims and debts which petitioner had against Biesinger.

In an independent transaction, Fred Biesinger went into partnership with one E. R. VomBaur for the construction of several multiple unit dwellings. The partnership was apparently successful and produced a profit. E. R. VomBaur sold his interest in the partnership to petitioner. Fred Biesinger has failed to account to petitioner for petitioner's share of the profits, and petitioner has filed an action against Biesinger to compel an accounting.

It is not clear how Fred Biesinger would benefit by an involuntary bankruptcy, or how he would even be affected by it except that he might find it easier to compromise his debt to petitoner with a trustee.

Who is A. P. Neilson?

On October 23rd, 1967, John Marshall, A. P. Neilson's attorney, made this statement into the record:

> MR. MARSHALL . . . "There has never been a list of creditors with their addresses filed or a statement or a short summary of his assets and liabilities.
>
> This is particularly critical to us, because we don't actually claim to be a creditor or debtor; that is on behalf of Mr. A. P. Neilson. The way he got involved in this matter is that Mr. Neilson is the owner of certain real property in Salt Lake City which he acquired from Mrs. Dennett, the petitioner's wife."

On July 25, 1968, A. P. Neilson entered into a written agreement with one Brent Bauer. Two of the paragraphs in that agreement read as follows:

> C. There is presently a controversy in the Third District Court concerning the said property where(in) one John Elwood Dennett and his wife, Herta K. Dennett maintain that the Seller holds the said building in trust for the said Dennetts.
>
> 7. Seller hereby assigns all of his right, title, and interest in and to the litigation involing the subject property referred to in Paragraph C above to Buyer. (Brent Bauer)

As part of the law suit aforesaid, A. P. Neilson was asserting the right to collect certain cash advances he

made on behalf of Mrs. Dennett (whom he has never met).

Petitioner and his wife have filed suit to secure an accounting for part of the mortgage proceeds realized from Walker Bank which he has not turned over yet. Moreover, there are other causes of action in the various suits *against* Mr. Neilson for damages.

Throughout the proceedings, in depositions and in private conversation, A. P. Neilson has stoutly maintained that he knows nothing about any bankruptcy proceedings and that he has had nothing to do with any bankruptcy proceedings for or against anyone.

What he is supposed to be doing in this case is a total enigma. His attorney maintains he isn't a creditor of petitioner. He maintains he has had nothing to do with petitioner's involuntary adjudication. If he ever was a creditor, he assigned his claim to Brent Bauer. (Mr. Bauer has since assigned it to James C. Danielson)

How Dudley C. Amoss, his present attorney, has the temerity to join in a response to petitioner's petition for certiorari defies all precedents.

How A. P. Neilson would benefit by an involuntary bankruptcy proceeding is not clear. He might, like the other debtors of petitioner, think that he could deal better with a trustee in the settlement of his indebtedness to petitioner.

Does petitioner have any creditors who hold unsecured claims over $500?

Yes. There are 16 claims held by nine people. None of them are panic-stricken. All of them are receiving their payments in a completely acceptable manner. None of them want petitioner placed into involuntary bankruptcy. None of them think that they could possibly be benefited by a bankruptcy proceeding. None of them understand what the other mixed group of secured creditors and debtors of petitioners (who filed the response on May 21st, 1969) are seeking. Moreover, they do not understand why this other group undertakes to judge what would be for their best interest, then after all, they are the creditors, the ones who should have a say-so about whether a bankruptcy should be forced, and the only ones who would be affected thereby. Their names and approximate amounts of claims are as follows:

James C. Danielson (Claim #1)	17,000.00
James C. Danielson (Claim #2)	137,000.00
William G. Norman	15,000.00
Ronald C. Barker	2,000.00
Richards, Bird & Hart	2,000.00
*Nettie H. Dennett	25,500.00
Glenna M. Dennett	4,500.00
Oak Hills Inc.	5,000.00
David E. Roller	3,000.00
Harriet E. Wise	4,000.00

C. Dwayne Harrison, holds the following claims

previously held by other creditors:

Utah Concrete Pipe Co.	500.00
*Hyland Luumber Co.	1,000.00
*Granite National Bank	5,500.00
*Continental Thirft & Loan	3,500.00
*Murray First Thrift & Loan	3,000.00
Time Finance Co.	4,500.00

(*) Those marked with an asterik have some security, although the value thereof falls below the amount of the debt.

Prejudicial and unethical irrelevancies in the opposition's brief

The argument of Beneficial et al as set forth in their second point (on page 19 of their response) is so full of irrelevancies and illogical argument that it is virtually impossible to make an intelligent response thereto.

By disseminating copies of the response brief to 200 people listed in petitioner's original appendices, they have furthered their primary objectives which is to malign petitioner and make him appear to be a social outcast.

They appear to be more intent upon publicizing petitioner's loss of his right to practice before the state's courts than in making a valid legal argument to the Supreme Court of the United States.

Just what difference is it supposed to make that a person set upon by his non-creditor who try to force an

involuntary bankruptcy upon him, now has or has ever had the right to practice law before the state courts? Does the Chandler Act make a distinction between distressed attorneys and distressed non-attorneys? Or between distressed non-attorneys and distressed ex-attorneys?

They try to bottom their under-handed references to petitioner's professional status by claiming that petitioner was fully "capable of understanding the consequences of his failure to comply with the provisions of Chapter XII." Has petitioner ever denied that he fully knew the consequences? Or suppose petitioner didn't know the consequences. Does the Chandler Act distinguish between those who fully know the consequences of late filings from those who do not fully know the consequences of late filings under Chapter XII of the Chandler Act?

Despite all of the pet shibboleths of courts that "disbarment of attorneys is not punishment, but a means of protecting the public," the practical consequences of such an event are beyond description. Disbarred attorneys are in a social class lower than ordinary felons. Crimes of ordinary felons, no matter how henious, do not involve betrayl of a trust, falling from high places, or treachery, which the public automatically infers when they hear of disbarred attorneys.

Such was not the case with petitioner. Neither the transcript nor the order of the Supreme Court made any reference to any wrong-doing on the part of the petitioner. There is much that needs be said on that subject, but this is neither the time nor the place to air this matter. Suffice it to say that the order of the Utah Supreme Court

(415 P2d 245) is more of an indictment of the court which entered it, and the bar commissioners who urged it, than it is of petitioner. It was the fruition of a conspiracy which was several years in the making. The entire opinion is set forth verbatim in appendix A hereto.

It is with the greatest restraint and upon counsel of respected members of the local bench that more is not said upon the subject. Much more needs to be said, but not here. Against the argument of petitioner that even the most disciplined minds cannot toally ignore and disregard extraneous but prejudicial facts, petitioner was counseled to ignore the matter and hope the Supreme Court would do the same.

The Utah State Bar Canon of Professional Ethics contains the following canon: (Canon #22)

> "A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissability, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce an argument, addressed to the court intended to influence the jury or bystanders."

One would think that a similar rule would apply to prejudicial statements made to a court, and that if those opposing petitioner insist on being unethical, they ought not to make a display of it to the United States Supreme Court.

The balance of the argument in their second point

is directed to the question of petitioner's late filing of his schedules.

The question of the late Filing:

The Schedules and Statement of affairs were filed late. That makes the proceeding defective and, unless the judge relieves the "defaut," it makes it mandatory for the judge to either dismiss the proceeding, or to adjudge petitioner a bankrupt. Or is it? If so, why?

Beneficial et al discredits petitioner's statements that he was prevented from filing the schedule on time by Mr. Marshall and Mr. Smith, who took action in the State Courts in defiance of the automatic stay provisions of Chapter XII of the Chandler Act. None of those responding to petitioner's petition for certiorari took part in those state court proceedings, so they cannot be expected to know just how much those proceedings preoccupied petitioner and how serious they really were. Since Beneficial et al do not know and cannot know they should withold judgment. They are not in a position to say that the pre-occupation was either an adequate or an inadequate reason for not filing the schedules earlier.

Petitioner has a rather vivid recollection of the period between September 14, 1967 and November 1st, 1967, a period of about six weeks. Petitioner recalls sitting in the state court all day and typing pleadings and briefs and doing research all night, to keep ahead of Messrs Smith, Tuft, and Marshall who worked in relays against petitioner. Besides the matters pending in the District Court, there were interlocutory appeals and petitions for

writs of prohibition pending in the Utah State Supreme Court.

Their strategy was very clever. Instead of suing petitioner, with whom A. P. Neilson had had all dealings respecting the petitioner's property, A. P. Neilson's attorney sued Mrs. Dennett, whom he had never met. Every single order and proceeding that issued out of the case, however, was directed at petitioner, who, although not a party to the action, was the object of every single proceeding taken in the case. Mrs. Dennett was never bothered, and was scarcely aware that anything was happening. Petitioner was kept in court nearly every day for a period of six weeks.

Beneficial et al argues in the response brief that petitioner could have obtained additional stay order either in the State or Federal Courts. How incredibly naive. Judge Christensen's position: "I have entered my order staying all proceedings against the debtor or his property. He who proceeds against the debtor or his property proceeds at his peril." (It didn't turn out to be much of a peril. Everyone proceeded as if no pronouncement had been made.) Judge D. Frank Wilkin's position (The State Judge): "It doesn't matter what Judge Christensen has said. There is nothing in the order which prevents this court proceeding as it chooses in a case that's brought by a plaintiff against *Mrs. Dennett* and the fact that the main thrust of the suit between A. P. Neilson and Mrs. Dennett is against the petitioner is a matter which is of no concern to me. If I am in contempt of Federal Court, make the most of it."

Beneficial et al state that no such explaination (for

the late filing) was made to the Federal Court. Obviously. The Federal Court didn't want to hear evidence on anything. There was no such opportunity. Petitioner's petition to the Federal Court to be relieved of his two-week default (after two two-week extensions) should have been set for hearing and evidence should have been taken. Remember, there was no evidence *of any kind* received in this hearing—*at any time*—ever.

Beneficial et al fails to offer their theory to explain the late filing. What do they attribute it to? Indifference? Laziness? Incompetence? Illness? Mental lapse? Accident? Why don't they come forth with a theory?

The greatest hypocrisy of all, however, lies in their six-month default in responding to petitioner's petition for certiorari. They are arguing to the Supreme Court.

> "Our default of nearly six months in answering the petitoner's petition for certiorari should be overlooked."

> "Petitioner's petition for relief under Chapter XII was not accompanied by schedules. They were filed two weeks late. He should, by reason thereof, be disgraced, dishonored, and placed in public shame, notwithstanding the fact that none of his creditors would even be remotely benefited thereby."

> "Moreover, the court should remember that involuntary bankruptcy is not a form of punishment. It is prosecuted for the benefit of the creditors. We can't exactly point out which creditors would be benefited, or how they would

be benefited by an involuntary bankruptcy. Nonetheless, he filed the schedules late, and he *must* be placed in bankruptcy, keeping in mind, however, that this is not a form of punishment."

Beneficial et al argues that Section 481 of the Chandler Act (11 USC 881) gives the court no discretion. Doesn't it? It gives the court at least two choices. Collier says that the court has at least three. The third choice is inherent in every court of equity. (9 Collier 1190)

". . . since an arrangement cannot be confirmed in any of these situations unless the court by extending the time for performance or by other appropriate action removes the existing default."

This is not only illustrates the point that a default can be removed. It deals with the bigger problem, which has escaped Beneficial et al. They have become so engrossed in the trees that they don't see the forest. Section 481 (11 USC 881) is part of Article X of Chapter XII. It spells out what avenues are open to courts in situations *where an arrangement cannot be confirmed.*

Articles I through IX of Chapter XII deal with the steps to be taken leading to an arrangement. Article IX deals with the proposal, confirmation, and consumation of the arrangement. Article X deals with situations where the arrangement does not succeed. Its a catch-all Article, and says that if there is something preventing the consummation of an arrangement, the court may dismiss the proceeding or adjudge the petitioner a bankrupt, according to the best interests of the creditors.

Now one of the things which would prevent an arrangement would be the lack of a schedule of a petitioner's assets and liabilities. It should be remembered that the schedules were filed, and had been, and were in the possession of the court when the adjudication was entered by the court. The lack of schedules was not an obstacle to any confirmation of an arrangement. A. P. Neilson's attorney was trying to take advantage of a technical late filing, although he, himself caused the filing to be late.

In so doing, however, he chose to rely on the wrong technicality. Section 481 does not say that if the statement and schedules are not filed *when* provided, the language of the statute is *as provided.* Petitioners are trying to read it to say that *when provided.* The meaning is "as required by" not "when required by." The other relevant phrase is "are not duly filed." They are trying to make it read "are not timely filed." Such is not the meaning. There is a difference in meaning between "when" and "as." There is also a difference in meaning between "duly" and "timely." ("As" means "in the manner.")

There is nothing in the record upon which the court could form an opinion as to what is in the best interest of the creditors, which seems to dictate which of the two alternatives the judge must choose between, *if the petitioner had been adjudged guilty of an act of bankruptcy, had asked to be adjudged a bankrupt, and was not a wage-earner.*

If the petitioner has not been adjudged guilty of an act of bankruptcy, or is a wage earner, and has not

requested *in writing* to be adjudged a bankrupt, the judge has only the choices of continuing the Chapter XII proceeding by permitting the late filing of the schedules or of dismissing the proceeding.

But assume, arguendo, that the judge had to choose between dismissal and adjudication only. An opinion on that choice should be founded upon some evidence and facts. The wishes of the secured creditors, or petitioner's debtors don't even enter into consideration. Does the opposition care to name one unsecured creditor who wishes an involuntary bankruptcy? Does the opposition care to name one way the unsecured creditors, the only ones who would be affected by an adjudication, would be benefited? Does the opposition care to state why they are in a better position to judge this question than the people who would be affected thereby are?

Beneficial et al must not have taken time to read the cases of *Trop* vs. *Dulles* 356 US 86, and *Zwick* vs. *Freeman*, 373 F 2d 110, which they cited to the court.

The Trop case holds that denationalization is a form of cruel and unusual punishment and is barred by the VIIIth amendment, and that the concept of punishment is not necessarily confined to criminal proceedings. The Trop case dealt with the denial to plaintiff of a passport because of his loss of citizenship.

The Zwick case holds that the barring of Messrs Zwick from employment in one limited industry, namely industries which are licensees of the Commodities Act, for the period of one year was not, *on the facts*, cruel or unusual punishment.

How these two cases bear upon the right of a court to adjudge petitioner a bankrupt involuntarily for the late filing of some schedules, escapes petitioner.

And, in response to petitioner's private letter to his creditors, aside from the expressions of Beehive State Bank's attorney, who attended, and Fred Biesinger, who attended, both of whose opinions were disregarded because they were not creditors, the overwhelming opinion of the creditors was that under no circumstances should a regular bankruptcy be considered.

Finally, petitioner's expression to the court that the "overall objectives might be accomplished by the court's order (of adjudication)" was based on the erroneous assumption that his true creditors, who attended the caucus in the hall, concurred in the opinion. Only after court, did petitioner learn of the obscenities about petitioner that were discussed in the hall, and that the creditors were not allowed to say one word about what should happen in regard to an adjudication.

Moreover, if the adjudication is to be based on consent, the law prescribes that the consent must be a written consent. What was said in court does not have the meaning Beneficial et al are trying to give it, and even if it did have the meaning they are trying to give it, it is of no consequence because it was not in writing.

Was petitioner deprived of his property without due process of law?

It isn't a question of whether a person, in America can be derpived of his property. This is done every day. It is perfectly constitutional to deprive a person of his property as long as it is done in accordance with the law.

There can also be no question about the fact that the adjudication of a person in bankruuptcy involuntarily deprives him of his property.

The only question is whether the deprivation in the instant case is in accordance with the law. That is the very question the entire proceeding is trying to examine. If the adjudication of petitioner by Judge Christensen was in accordanee with the law, the deprivation was constitutional. If the adjudication of petitioner by Judge Christensen was not in accordance with the law, the deprivation was not constitutional. It is as simple as that.

It is the purpose of the petitioner's petition for certiorari and this reply to demonstrate that the adjudication was not only not in accordance with the law, but was so far outside the accepted course of judicial proceedings, that it is an outrage and urgently merits the attention of the United States Supreme Court.

Was petitioner unusually punished by the adjudication?

It isn't a question of whether a person can be punished by a court. This is done every day. It's perfectly constitutional to punish a person for not complying with the law.

There can be no question about the fact that the involuntary adjudication is a form of punishment.

The only question is whether it isn't somewhat unusual to send a person through bankruptcy involuntarily for filing some schedules late, when the lateness was

unavoidable.

The schedules weren't filed until November 14, 1967. This was 60 days after the petition was filed, but a considerable time before the adjudication was entered.

In this community, a bankruptcy of this nature is shame, disgracement, humiliation, and ostracism. It is the subject matter of small-talk and gossip. It makes one's neighbors and friends shun him. The credit bureau reports it to every prospective credit grantor. A shadow is cast upon every prospective business transaction. Many opportunities pass one by. Prospective employers infer some type of dishonesty from an involuntary adjudication. Bonding companies, who previously wrote $100,000.00 performance bonds without security and without hesitation, now decline to write a $300.00 replevin bond. Any type of white-collar employment is precluded. A resumption of any type of professional unemployment is all but precluded. It is impossible to purchase life insurance for at least two years. Employees distrust their employer when they learn of the involuntary adjudication. A normal church and social life suffer. A bankrupt's children are subject to humiliation by their schoolmates. A bankrupt's wife is constantly faced with embarassment. Is this punishment?

To adopt and adapt some language from the *Trop* case cited hereinabove, "Should a government (or a judge) have a license to devise any punishment short of death, within the limit of it (his) imagination?"

A punishment of this severity *may be warranted* in some cases. These punishments enumerated hereinabove are not greater than those a felon suffers, but is the late

filing of schedules that serious?

Is an involuntary adjudication a correct punishment for filing some schedules late?

Does it make a difference that petitioner is not insolvent?

Does it make a difference that petitioner committed no acts of bankruptcy?

Does it make a difference that A. P. Neilson is not a creditor?

Is the punishment unusual?

Is it cruel?

Is it constitutional?

Should the court give credence to the argument that the punishment should be upheld when the argument is made by petitioner's opponents who are six months late in filing their response to the petitioner's writ for certiorari themselves?

Are there no guidelines as to whether a court should dismiss or adjudicate?

In *Tyler* vs. *Marine Midland Trust Co.* 128 F 2nd 927, the judge said,

> "An example (of when it might be in the best interest of creditors to dismiss the petitioner instead of adjudicating the petitioner a bankrupt) might be an instance where the debtor acquired

property after filing his petition, which property would not come under the control of a trustee as of the date of the original petition."

He also said the following:

> "If the financial affairs of the debtor (are) in such a condition that the administration of his estate in bankruptcy *is necessary* to prevent attachments, preferences and dissipation of assets and other events injurious to the affairs of (unsecured) creditors in general (an adjudication may be entertained)."

The first quotation above gives some excellent guide lines and certainly applies to the instant case. The second quotation implies that a person might be adjudged a bankrupt involuntarily without proof of acts of bankruptcy. Petitioner obviously does not agree with the implied statement of the law on involuntary adjudication (without proof of bankruptcy acts), but this is incidental. This judge at least puts the matter on the basis of some *necessity* to prevent attachments, preferences, or dissipation.

Where is the opposition's evidence on these questions? Is the choice between the alternatives just a question of how the matter subjectively strikes people? Do people just intuit such things without hearing *any* evidence? The opposition is urging upon the lower courts and the appellate courts that the question of what is in the best interest of the (unsecured) creditors is largely a question of intuition. Is that what our jurisprudence is based upon?

Can a person in Chapter XII proceedings be adjudged a bankrupt without his consent and without proof of acts of bankruptcy?

The candor of the opposition in admitting that they stand for the proposition that a person *can* be adjudged without proof of acts of bankruptcy and without consent is disarming. They state that they stand for that proposition without equivocation. It is the precise, verbatim wording of their point #3 on page 25 of their brief.

They say that the provisions of Chapter I through VII dealing with involuntary bankruptcy, acts of bankruptcy, acts of bankruptcy and pleading and proving acts of bankruptcy and are inconsistent and in conflict with the Chapter XII provisions and therefore not applicable.

Are they? Why are they? Does 424(1) (11 USC 841) actually permit a court to adjudge a chapter XII petitioner a bankrupt without his consent and without proof of bankruptcy? On what authority? Based upon what precedents?

We have nothing before us except the opposition's naked assertion that it is so. We have nothing before us except the opposition's own interpretation of the matter. Is it a fair interpretation? Is it reasonable? Is it an interpretation congress would have intended?

Section 402 of the Chadler Act (11 USC 802) says that Chapters I through VII, as far as they are not inconsistent, shall apply to Chapter XII proceedings. That means that Chapters I through VII should not be followed where the requirements of Chapter XII make it imposs-

ible or practical to do so. In all other cases, the provisions of Chapters I through VII should be followed.

Now what is so difficult or strange about following the provisions of chapters I through VII when an involuntary adjudication is sought under Section 424?

It would at least insure that people who are not insolvent would not be adjudged bankrupts.

It would at least insure that the unsecured creditors, who are to be affected thereby, would be heard (and that secured creditors and debtors would not be heard).

It would at least insure that non-creditors like A. P. Neilson would not be filing unverified motions.

It would at least insure a pleading which would accuse a petitioner of an act of bankruptcy. And a chance to plead thereto. And a chance to have the issues tried. And a chance to raise affirmative defenses. And so on.

It would also, incidently, prevent secured creditors and debtors of the petitioners from prosecuting appeals.

Is a person entitled to a trial on the question of wage-earner status?

11 USC 22 guarantees to an involuntary bankrupt an *impartial trial* on disputed issues.

11 USC 22 also says that the status of an alleged bankrupt as a wage earner shall be determined as *of the time of the commission of the act of bankruptcy.*

11 USC 884 says that no adjudication shall be entered under Chapter XII against a wage-earner, unless he con-

sents to the adjudication in writing.

The opposition suggests that there is enough in the statement and affairs and schedules to establish the non-wage-earner status of the petitioner.

The law doesn't mandate the court to look at the schedules and statement of affairs to see if the court (or the opposition) can infer enough to obviate a trial on the question. The law requires that the issue be *tried*. This means that evidence is taken on the matter.

It means that the evidence is carefully weighed and considered.

The opposition correctly demonstrates, and they are indeed correct, that prior to the time the Chapter XII petition was filed, petitioner had been self-employed and indeed derived rather substantial income from investments. The obligations for office furniture, micro-film equipment, card-punch machines, accounting machines, mortgages, trust deeds, law books, car rentals, equipment repairs, deposition reporting, surveying, printing of briefs, business forms, office supplies, airline tickets constable's services and office rent do indeed give evidence of *former* self-employment.

That isn't the question. The question is whether *at the time the alleged act of bankruptcy accured*, the alleged bankrupt was a wage-earner. (He was) This makes it rather difficult to fix a time, because the opposition does not contend and has not contended that petitioner ever committed an act of bankruptcy. So what is the problem? Trying to determine, by evidence and a trial, whether the petitioner was a wage-earner at the

time he would have committed an act of bankruptcy if he had committed one. But he hasn't committed an act of bankruptcy. So this gets to be a real problem. We have to try to fix a time that a non-existant act occured so that we can determine what a person's status was at the time it didn't occur.

Which is an additional argument for the proposition that Chapter I through VII applies to involuntary proceedings under Chapter XII. USC 884 (which is a part of Chapter XII) enters a prohibition against adjudging a wage-earner a bankrupt. How is that issue to be determined except in accordance with 11 USC 22 (which is a part of Chapters I through VII)? Does the opposition really want to stand for the proposition that Chapters I through VII do not apply to involuntary proceedings under Chapter XII? Are they really serious?

The opposition gives a lengthy citation from Carpenter vs. Cudd, 174 F 603. It is very scholarly, but the opposition misses the point. Carpenter vs. Cudd discusses the *evidence* which was *adduced at trial.* The opposition should read the parts of the case which relate to the question at hand and not some irrelevant portion. These are the relevant citations from the Carpenter case:

> "On January 31, 1908 a petition in involuntary bankruptcy was filed by certain *unsecured* creditors against Carpenter. (The petition charged Carpenter with acts of Bankruptcy.) Carpenter answered, denying insolvency and alleging . . . wage-earner . . . (status).
>
> At the conclusion of the *evidence* taken at the *trial* of the case . . . the court . . . (etc) . . ."

The opposition's citation to the Gainfort case (14 F. Supp 788) is also helpful. It doesn't help them, because Gainfort was also given a trial on a verified petition of his unsecured creditors and his answer thereto. It does, however, stand for the following propositions:

> HN4: Whether a person is a wage-earner so as not to be subject to involuntary bankruptcy proceeding must be decided on the particular facts.
>
> "It is settled that at *the time the act of bankruptcy occurred* is the time at which his status (as a wage-earner) is to be determined. He may shift occupations from farmer to wage-earner and back again, but if he was a wage-earner at the time the act alleged was committed, that is all that is required.

Did the Tenth Circuit Court, breach Canon 19 of the Canons of Judical Ethics?

Since this involves to some extent the question of intent, and since petitioner has no access to the inner-reaches of the minds of the justices of the Tenth Circuit Court, it is impossible to say what caused the entry of this most unusual "order of affirmance." Moreover it is difficult to say why the court would aribtrarily, and without cause or reason, cut off an appeal and refuse to receive either briefs or arguments. The Tenth Circuit is generall known as a rather sophisticated, erudite, court, having great perception and insight to legal problems.

Something obviously went wrong in this appeal, and people are left to speculate as to what happened. For

whatever else might be said of their action, it is certainly without known precedent, and to say that it departs from the accepted course of judicial proceedings is a dangerous understatement.

It is not the intention of petitioner to put the Tenth Circuit Court on trial. Too little is actually known about the circumtances to form an intelligent opinon. Outwardly, however, the record leaves more than ample grounds for the granting of certiorari, which is petitioner's only present objective.

It is most interesting to see how the opposition tries to twist Canon 19 of the Judicial Ethics around to suit their purposes. They would try to make it read that courts should only indicate reasons for their actions and render opinions in cases where lower courts are reversed.

The Canon lends itself to no such interpretation. There are two paragraphs in the Canon and the paragraphs, while dealing with the same subject matter, stand independent of each other. The second paragraph deals with reversals and new trials. The first paragraph deals with affirmances as well as reversals and new trials. The language is clear.

> "In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

> "It is desirable that Courts of Appeal in reversing and granting new trials should so indicate their views on questions argued before them and necessarily arising in the controversey, that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions (etc.)."

Now why try to read a different meaning into the canon?

Incidently, while certiorari is discretionary, an appeal to the circuit court is not. That is a matter of absolute right.

CONCLUSION

The brief of the opposition points out, contrary to its intent, additional reasons for granting certiorari as prayed for in petitioner's original petition. There are so many errors and departures, it is nearly impossible to find anything that was done in accordance with the law and the constitution. This makes it difficult to know which of the many errors and outrages should be emphasized in seeking certiorari. Any one should suffice.

Respectfully submitted,
s/ JOHN E. DENNETT
Appearing pro se
1243 East 2100 South
Salt Lake City, Utah

APPENDIX "A"

THE SUPREME COURT OF THE STATE OF UTAH

In re:

John Elwood Dennett,

Disciplinary Proceeding.

No. 10627

FILED

August 3, 1966

Clerk, Supreme Court

Utah

PER CURIAM:

It appearing that the Board of Commissioiners of the Utah State Bar filed its report on May 4, 1966, as to the investigation and findings of the disciplinary proceedings brought against John Elwood Dennett, said Commission recommending his disbarment; that thereafter, on May 24, 1966, Mr. Dennett, by counsel, filed with this Court a Petition for Remand of the matter to the Bar Commission on the basis that Mr. Dennett was denied due process for the reason that he as an accused had not been given an opportunity to be heard by the Commission before the latter's recommendation; that hearing thereon was had before the Court on June 6, 1966; that thereafter, on June 6, 1966, the matter was returned to the Bar Commission with a request that such an opportunity be granted; that thereafter, in response to such request, the Bar Commission, all but one member present, afforded such opportunity and heard Mr. Dennett and his counsel on June 15, 1966, at Park City, Utah, and after considering he arguments presented, returned the matter to this

Court, re-affirming the original recommendation; that thereafter, on July 7, 1966, Mr. Dennett filed a petition objecting to the Bar Commission's action, requesting, for *medical reasons*, a suspension, rather than disbarment: that thereafter on July 22 1966, Mr. Dennett filed a Petition for Review, without waiving the Petition of July 7, 1966; that the foregoing petitions were argued to the Court by counsel for Mr. Dennett and for the Bar Commission at the termination of which argument counsel for both sides stipulated in writing as follows:

> It is hereby stipulated by counsel for Mr. Dennett and for the State Bar Commission that following the hearing of this matter this day the matter is submitted for plenary review by the Supreme Court upon the record before the Court, the arguments which were made before the Board of Bar Commissioners at Park City (June 15, 1966) being submitted together with oral arguments made this day as the arguments of the matter before the Court.

Having heard the arguments, reviewed the matter and the pleadings, it is ordered that the recommendation of the Utah Bar Association be sustained, and it is ordered and adjudged that Mr. John Elwood Dennett be, and he is, disbarred from the practice of law in the State of Utah, and that his name be, and hereby is, stricken from the roll of Attorneys of the State of Utah.